Petition

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DANIEL LIBERMAN aka
DANIEL LIEBERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals should have reversed the conviction of Petitioner due to the insufficiency of evidence to show the knowledge and intent necessary to support a finding of conspiracy? This is an important and unique question in this case because the primary witness for the United States was an alleged co-conspirator and an admitted liar and thoroughly impeached and reliance on such a witness could adversely affect the quality of justice in the entire country.

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The Defendant-Petitioner, DANIEL LIBERMAN, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the

Ninth Circuit in this case, entered on April 6, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is a decision without published opinion, 647 F.2d 173, and is printed in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals (647 F.2d 173), printed in Appendix A hereto, was entered on April 6, 1981. Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed and was denied on August 14, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner's Opening Brief, Reply Brief and Petition

For Rehearing before the Court of Appeals for the Ninth Circuit are referred to frequently in this Petition. Therefore, copies of said Opening Brief, Reply Brief and Petition For Rehearing have been lodged with this Court for the Court's consideration in ruling on this Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the due process clause of the Fifth Amendment to the United States Constitution and the Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

In March, 1980, the Grand Jury for the Central District of California

handed down an indictment, in fifteen counts, charging Petitioner DANIEL LIBERMAN and one MERRILL "GENE" JONES with conspiracy to commit mail fraud and mail fraud in violation of Title 18, United States Code, §§ 371 and 1341, respectively. Specifically, the indictment charged both defendants, in Count One, with conspiring to use the United States mail for the purpose of carrying out a scheme to defraud a corporation, Farmers Group, Inc., (hereinafter referred to as "Farmers"), to obtain money and property from Farmers by means of false and fraudulent pretenses, misrepresentations and promises. Counts Two through Fifteen charged that defendants placed or caused to be placed, certain matters in the mail.

Petitioner DANIEL LIBERMAN pled not guilty to each of the fifteen counts and a jury trial was commenced on June 10, 1980, before the Honorable Irving HILL. Defendant Jones had previously pled guilty to a lesser number of counts and testified as a witness for the Government at Petitioner's trial. Motions for Judgment of Acquittal as to all counts were made by Petitioner LIBERMAN at the conclusion of the Government's case and again at the conclusion of the trial, and both motions were denied. The jury reached a verdict of guilty as to all counts, and on July 23, 1980, Petitioner was given concurrent sentences of fifty-four months on each of the fifteen counts.

Petitioner renewed his Motion for Acquittal orally, on June 18, 1980, and

in writing, on July 2, 1980, and this renewed motion was denied on July 14, 1980. Petitioner timely filed a Notice of Appeal in the United States Court of Appeals for the Ninth Circuit on July 15, 1980, and he is presently free on $40,000.00 bail pending the determination of this matter. The Court of Appeals affirmed Petitioner's conviction in an opinion by Judges Ely, Alarcon and Templar on April 6, 1981, which is printed in Appendix A hereto. Petitioner LIBERMAN filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied by the Court of Appeals on August 14, 1981.

REASONS FOR GRANTING THE WRIT

1. CERTIORARI SHOULD BE GRANTED TO DETERMINE IF THE COURT OF APPEALS SHOULD HAVE REVERSED PETITIONER'S CONVICTION DUE TO INSUFFICIENT EVIDENCE TO SHOW THE KNOWLEDGE AND INTENT NECESSARY TO SUPPORT A FINDING OF CONSPIRACY.

Petitioner requests that certiorari be granted on the ground that the jury could not reasonably have found, based on the evidence presented, that Petitioner was guilty beyond a reasonable doubt. In considering an appeal from a judgment of conviction,

> "[t]he appellate court may inquire whether the evidence, considered in a light most favorable to the Government, permitted a rational conclusion by the jury that the accused was guilty beyond a reasonable doubt."
> **United States v. Gardner** (9th Cir. 1973), 475 F.2d 1273 at 1275.

There is no question that Petitioner associated with Defendant Jones. Conviction of conspiracy, however, requires more than mere proof of association with an alleged co-conspirator. **United States v. Martinez** (5th Cir. 1973), 486 F.2d 15. The Government had the burden of proving the element of intent -- that Petitioner knew of the conspiracy and joined it with intent to further its unlawful purpose. **United States v. Tyler** (5th Cir. 1975), 505 F.2d 1329. The Government did not meet its burden on this issue.

(A) THE TESTIMONY OF A THOROUGHLY IMPEACHED WITNESS IS INSUFFICIENT EVIDENCE FOR A FINDING OF GUILT.

The Government's case against LIBERMAN was built on the testimony of Gene Jones, a thoroughly impeached, unreliable witness who admitted lying to Federal Postal investigators as well as Farmers' investigators who questioned him during January and February of 1980. (Opening Brief, quoting Reporter's Transcript, page 460, lines 8-13.) The only material evidence of LIBERMAN's involvement came from Jones, who had named LIBERMAN as a participant. Jones was an inherently unreliable witness and his credibility was repeatedly impeached at the trial.

The unreliability of Jones' testimony is explored in Petitioner's Opening

Brief (pages 9-10). Jones gave inconsistent testimony and made false statements as to several key aspects of the alleged plan, including when he first met LIBERMAN, the amounts LIBERMAN allegedly was to pay him and the date when Jones first started his plan to defraud Farmers. A reading of Jones' testimony on cross-examination reveals that he gave a different and inconsistent version of the facts and told a different story at every pre-trial interview that was conducted. (Petitioner's Opening Brief, page 10.) In fact, the Assistant United States Attorney, on re-direct of Jones, asked him when he stopped lying. (Opening Brief, page 7 quoting Reporter's Transcript, page 640, lines 8-13.)

Jones was caught in a lie when he testified on cross-examination that he had not, to his knowledge, signed any sales order forms. (Reply Brief, page 3 quoting Reporter's Transcript, page 268, lines 9-10.) Defense counsel then showed Jones what the Court described as ". . . a group of sales orders . . ." (Reply Brief, page 3 quoting Reporter's Transcript, page 269, line 14.) Jones then identified his signature on said sales order forms. (Reply Brief, page 3 quoting Reporter's Transcript, page 270, lines 16-18.)

Considering Jones' admitted lies to the investigators and the many inconsistencies in his story, it seems obvious that his testimony could not have been sufficient to sustain a conviction.

(B) THE BARE FACT THAT THE PETITIONER USED VARIOUS NAMES HAS NO SIGNIFICANCE AND IS NOT SUFFICIENT EVIDENCE TO SHOW THAT PETITIONER KNOWINGLY AND INTENTIONALLY JOINED THE CONSPIRACY.

Beginning on Page three of the Appellate Court's opinion, the Court states:

> "Sufficient circumstantial evidence was produced to show that Liberman had knowledge of the scheme to defraud Farmers. He paid Jones for the film . . . and used fifteen aliases in signing the checks."

This statement is not true. At the trial, and also in Petitioner's Opening Brief, Liberman gave a simple, and in this context, innocent explanation for his use of several names, i.e., he had been having creditor problems since the closing of his printing business. (Opening Brief, page 11.) In the

absence of a statutory prohibition, a person may use an assumed name in the transaction of his business and in carrying on his affairs. **Krueter v. United States** (10th Cir. 1952), 201 F.2d 33, 35. The use of various names has no significance in determination of the crucial issue of LIBERMAN's knowledge or intent. The Government's entire case on this key point consisted of the highly changeable and unreliable testimony of Jones and the bare fact that LIBERMAN used the names of different business entities in his trade.

LIBERMAN's court-room testimony pertaining to his use of various business names due to his creditor problems is certainly a believable, understandable and less culpable one than that suggested by the Court of Appeals.

There simply is no evidence from which the jury in this case could have come to a reasonable conclusion that Petitioner knowingly and intentionally joined the conspiracy. The Appellate Court, therefore, erred in failing to reverse Petitioner's conviction.

(C) THE COURT OF APPEALS IGNORED PETITIONER'S EVIDENCE IN REACHING ITS CONCLUSIONS AS TO PETITIONER'S GUILT.

The Appellate Court's conclusion that LIBERMAN in fact knowingly and intentionally sold film belonging to Farmers was apparently based on the erroneous premise that:

> "Liberman testified he could not recall the names of any of his suppliers."
> (Court of Appeals Opinion, page 2.)

Since the record reflects that LIBERMAN, in fact, did testify as to various names of his suppliers, the Court's conclusion is unsupportable and must be reversed.

LIBERMAN testified that he did purchase film from suppliers other than Farmers. He testified as follows:

> "Well, I bought [film] from several places. I bought - I purchased from Postal Instant Press. I purchased from Pro Printers. I purchased from a guy by the name of Jim Ryan, and various other little operations."
> (Petition for Rehearing, page 5, quoting Reporter's Transcript, page 482, lines 11-14.)

There was competent testimonial and documentary evidence at trial that flies in the face of a conclusion that LIBERMAN did not purchase film from other suppliers. Invoices reflecting purchases of over $60,000.00 worth of

film from Postal Instant Press as well as corroborating testimony of LIBERMAN's other film suppliers were presented.

The record plainly establishes that LIBERMAN bought film from other sources and he so testified at the trial. There would be no rationale for these purchases from other suppliers if LIBERMAN were receiving cheaper, stolen film from Jones. The Court of Appeals ignored or overlooked LIBERMAN's testimony on this issue and the concomitant competent documentary evidence verifying same. Consequently, the Court mistakenly concluded that the film that LIBERMAN sold was film belonging to Farmers that had been appropriated by Jones. Such a conclusion is unsupported by the evidence, and must be reversed.

CONCLUSION

The Government's case against LIBERMAN was built on a thoroughly impeached and unreliable witness; it asked the jury to infer the crucial elements of knowledge and intent from the insignificant fact that Petitioner used various business names. The Government proffered no evidence upon which a jury could reasonably find LIBERMAN to be guilty beyond a reasonable doubt.

Petitioner has been denied the right to a fair trial guaranteed to him by the due process clause of the Fifth Amendment to the United States Constitution and by the Sixth Amendment to the United States Constitution.

For each and all of the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

DATED: September 10, 1981.

Respectfully submitted,

LAW OFFICES OF GODFREY ISAAC

BY: GODFREY ISAAC

Attorney for Petitioner
DANIEL LIBERMAN

APPENDIX A

FILED: APRIL 6, 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEAL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

DANIEL LIEBERMAN, aka
DANIEL LIEBERMAN,

Appellant.

No. 80-1529
DC No. CR-80-300-IH

MEMORANDUM

Appeal from the United States District Court for the Central District of California,
Irving Hill, Chief Judge, Presiding
Argued and submitted March 2, 1981

Before: ELY and ALARCON, Circuit Judges, and TEMPLAR*, District Judge.

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*The Honorable George Templar, Senior United States District Judge for the District of Kansas, sitting by designation.

A jury found that defendant Dan Liberman conspired to commit mail fraud and committed the fourteen offenses of mail fraud alleged in the indictment. Liberman received concurrent sentences and he appeals.

Defendant complains that the evidence was insufficient to support a conviction of conspiracy to use the mails to defraud. He also contends that the court gave an inadequate instruction on the weight to be given the testimony of an accomplice, that he was subsequently prejudiced when the jury was told that his co-defendant had entered a plea of guilty prior to the trial, that he was prejudiced when the trial court refused to instruct the jury that the use of a fictitious or false name by itself is not a federal crime, and lastly that the

trial court committed error in not giving his proposed instruction that a defendant cannot be found guilty by association and his contacts with alleged co-conspirators are presumed innocent unless circumstances indicate otherwise.

It is sufficient to support a conviction of conspiracy if there are acts and conduct such that reasonable men could conclude that an unlawful agreement or understanding existed and that the accused, with the knowledge of its existence, acted to further it. United States v. Oropeza, 564 F.2d 316, 322 (9th Cir. 1977). It is not necessary to prove directly that the defendant knew of the criminal objectives of the conspiracy; this knowledge can be inferred from the defendant's actions and from

other circumstantial evidence. United States v. Sanchez-Murillo, 608 F.2d 1314, 1318 (9th Cir. 1978).

The evidence supporting the offenses charged discloses that Merrill Jones, charged as Liberman's co-conspirator, managed the in-plant printing department of Farmers Group, Inc. (Farmers). He was responsible for ordering film and printing supplies. In 1969, Jones started to defraud his employer. He ordered film from Itek Graphic Products (Itek). The film was sent directly to Jones by Itek but was billed to Farmers. Jones would approve the invoices, keep the film, and Farmers would pay Itek for it.

Liberman became involved in this fraudulent conduct when he purchased some of this film from Jones at lower

prices than he could obtain it from Itek, giving Jones checks signed by numerous aliases. These checks were for Jones' share of the proceeds from Liberman's sale of the film. In 1978, Liberman began selling Itek film to American Technical Supply Company (ATS). This film was obtained by him from Jones. Liberman testified that he could not recall the names of any of his suppliers. The evidence clearly shows that the Itek film which Liberman sold to ATS was film belonging to Farmers that had been appropriated by Jones. ATS then sold this film to Farmers. Jones again appropriated the film and returned it to Liberman who again sold it to ATS. ATS then sold this same film to Farmers again. Jones and Liberman

were dividing the proceeds from the sales of the film to ATS.

Liberman's co-defendant Jones, his accomplice, described their schemes and detailed Liberman's participation in them. The government presented evidence that Liberman had agreed with ATS to deliver Itek film from ATS to Farmers. Instead, the deliveries of the film were made to Jones and occurred on side streets, out of sight from Jones' office. Other evidence was produced. Several employees of Farmers, who worked in places where merchandise was delivered to it, testified that they had never seen Liberman deliver film from ATS to Farmers. Liberman did not produce any receipts or other documents to show that he had delivered the film to anyone.

Sufficient circumstantial evidence was produced to show that Liberman had knowledge of the scheme to defraud Farmers. He paid Jones for the film with checks payable to Jones instead of Farmers and used fifteen aliases in signing the checks. No record of their dealings was kept by Jones and Liberman. They consistently conducted the business relating to the film on side streets where other employees of Farmers could not observe them.

We hold that there was sufficient evidence to support the verdict of the jury that defendant Liberman knowingly agreed with Jones to defraud Farmers.

The trial court's instruction regarding the weight to be given the testimony of an accomplice adequately advised the jury that the testimony of an accomplice

must be received with caution and weighed with care. It closely follows the instruction we described in a footnote to United States v. Bernard, 625 F.2d 854, 857-858 (9th Cir. 1980). No objection was made to the instruction and, in any event, the instruction given is not plain error. Cf. United States v. Davis, 439 F.2d 1105, 1106 (9th Cir. 1971).

It was not reversible error for the court to inform the jury that a co-defendant had entered a plea of guilty to the charge of conspiracy when the court admonished the jury that the plea is not evidence in and of itself of the guilt of any other person. United States v. Halbert, _____ F.2d _____ (9th Cir. No. 78-3278, 3-6-81). The record discloses that defendant's counsel

agreed that the court should advise the jury of Jones' plea and no objection was offered to the court's statement.

Defendant proposed an instruction, not in compliance with Rule 14a, C.D.Cal.R., that the use of a fictitious or false name, by itself, is not a federal crime. The court refused this instruction on the grounds that it was argumentative and did not relate to a matter directly in issue. The defendant was not on trial for using a false name to defraud. His use of false names was relevant only because it could suggest a desire to conceal his true identity. We find no error here.

Defendant complains that the trial court erred in not giving his requested instruction that "Defendant cannot be found guilty merely by association, and

his contacts with alleged co-conspirators are presumed innocent unless circumstances indicate otherwise." We have examined the court's instructions. We observe that the trial court gave a similar instruction and that all points requested were included in the instructions of the court when considered as a whole. It is not necessary that instructions be given in the precise language requested by the defendant. United States v. Hughes, 626 F.2d 619, 627 (9th Cir. 1980). Nor is it necessary to repeat in each instruction that the government has the burden of proof beyond a reasonable doubt. Oliver v. United States, 396 F.2d 434 (9th Cir. 1968); United States v. Federbush, 625 F.2d 246, 254 (9th Cir. 1980).

No reversible error appearing in the record, we accordingly affirm.